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PAPERS

ADMINISTRATIVE CONTROL OF CORPORATIONS

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The question of the control of corporations by the government is substantially the question of the control of business by the government, since the most important business is now carried on by corporate organizations. How far it is desirable that the state should control business is a question regarding which there is a countless variety of views. Nothing is more obvious, however, than the fact that there is a strong popular demand for extension of the control of business, especially of corporate business, by both state and national governments. The reason for this demand is apparent. It is a political axiom that the power of the sovereign must be greater than the power of any subject, otherwise the subject in his turn becomes the sovereign. It is apparent, however, from any historical observation that the nearer a subject approaches to the sovereign in power, the less stable becomes the political equilibrium. When the Duke of Burgundy's power approached that of the King of France, the title of king was worth little more than that of duke. When the last of the barons ceased to be a king-maker in England, the English crown became a more valuable heirloom. These are well-known instances of the relation of powerful personal subjects to personal sovereigns, but the political principle is not limited in its application to cases where sovereign and subject are man and man. The national sovereignty established by our federal constitution has never been seriously threatened by any single state, but when a combination of states organized the Confederate States of America, the question of law as to the constitutional right of the federal government to coerce the states resolved itself into a question of fact as to whether the military power of the states which supported the national sovereign was greater than that of those states which were powerful enough to resist the national sovereignty for four years.

Hitherto the subjects who have been powerful enough to threaten their sovereign have been masters of a portion of the territory under the dominion of that sovereign. The rights of the barons, both in France and in England, were always connected with th e lordship over certain territory. The power wielded by the Confederate States of America was territorial in its extent. At the present time, however, a new division of power has been made. The most powerful subjects of the United States of America now control, not certain territory, but certain kinds of business. In place of magnates with a territorial designation, like the Duke of Burgundy or the Earl of Warwick, we have magnates who are popularly called coal barons and railroad kings. Our law, of course, knows no titles; but the popular use of titles with a geological, instead of a geographical significance, is worthy of notice. Instead of great domains, our magnates control great corporations with budgets of royal magnitude. On the subject of these corporations there is loud popular clamor, much of which is unreasonable and unreasoning. It is not, however, unreasonable that a democracy which has erected a national sovereignty, based on democratic principles, should have some fear as to the power of that sovereignty to control subjects so powerful as our great corporations. It is interesting in this connection to note that while the dangers from immense aggregations of capital under corporate control are pointed out on every hand, little attention is paid to the fact that other subjects than the corporations have become so powerful as to threaten our national sovereign. Although the doctrine has as yet found no support in the courts, it has been seriously urged by counsel in the Debs case and in the Gompers case that the worthy end of elevating the condition of labor, justifies, and therefore renders lawful, all means which in the opinion of labor organizations will aid that end. It is also worthy of note that in our sister republic of France, where, as here, liberty, equality, and fraternity are the ideals of government, organizations of laborers have threatened the welfare of the state, even though those laborers were employes in the service of the state itself. In the control of corporations, therefore, including under this broad head all great associations of capital or of labor, whether technically incorporated or not, lies the great problem of today.

By the adoption of the arbitrary theory of the separation of powers, for which the reason seemed more obvious in the eighteenth century than in the twentieth, our Constitution provides for a division of

governmental power between the executive, the legislative, and the judicial departments. Obviously, therefore, the control of corporations must be either executive, legislative, or judicial in its character. Judicial control of corporations is comparatively simple. If a corporation undertakes to exercise a franchise to which it is not entitled, there is the old prerogative writ of *quo warranto*, or the corresponding information, the effect of which, when prosecuted to judgment, is a judgment of ouster preventing the corporation from further exercise of that franchise. If a particular and definite duty is imposed upon a corporation, there is also the old prerogative writ of *mandamus* to compel the corporation to perform such duty. If the corporation is guilty of a criminal act, it is subject to trial and punishment as a criminal. If it invades the rights of others in such a manner that the person injured has no adequate redress at law, the corporation, like other persons, may be enjoined from such conduct by a court of equity. In certain cases, also, the state itself, or the United States, as the case may be, may obtain an injunction against illegal action by a corporation, the tendency of modern legislation like the anti-trust acts being to widen the sphere of equity jurisdiction in regard to illegal acts of corporations. If a corporation is guilty of such entire abuse of its franchises as to render it subject to capital punishment, then it may be dissolved either by the old writ of *quo warranto*, or, under modern statutes, and in certain cases, by the decree of a court of equity. Such, in brief, is the nature of the judicial control of corporations.

Legislation means, strictly speaking, the passing of laws. By the enactment of rules of conduct for corporations, therefore, the legislative body may and does exercise legislative control over corporations. Such legislation ordinarily relates to the conditions upon which individuals may acquire a corporate franchise, and the regulation of their relations as members of the corporation. In the case of public service corporations, the principal matters to which legislation is devoted are the character of the service to be rendered, and the charges to be made for that service. The very nature of parliamentary government, however, is such that it is practically impossible for the details of business to be regulated by statute.

The executive control of corporations, strictly speaking, is limited to the carrying out of existing laws. Perhaps the most conpicuous instance of executive control is the control exercised by the comptroller of the currency over national banks.

A comparison of the methods by which the governmental control is exercised as above stated, with the business methods of the most successful corporations presents an interesting contrast. From the standpoint of the government, it will be seen that normally there are three operations necessary to produce the actual result of controlling the corporation: first, the enactment of a statute laying down the rule by which the corporation is to be guided; second, the action of the executive in investigating the conduct of the corporation with regard to that particular rule; and, third, the action of the court after due and proper litigation at the instance of the executive, in ordering the corporation to obey that rule, or punishing it for its disobedience; to which may be added a fourth step, namely, the enforcement by the executive of the judicial decree. This is a solemn and elaborate process, and by this method in the course of a given number of years after the people have elected legislators for the purpose of accomplishing a particular result, that result may be accomplished. Compare with this one most of the successful cases of administration of an immense railroad system. In that case, which is well known, the stockholders elected a board of directors to manage affairs. The board of directors chose from their number an executive committee. The executive committee practically gave a power of attorney to the president of the corporation to do what he thought best. The result was that the control of that great railway system was vested in one man, who could act as fast as he could think. Whatever may have been the attitude of the public in this matter, it is clear that this method of management was satisfactory to the stockholders of the corporation. The contrast between the active management of a railway by the instantaneous response of all its machinery to the will of a single man, and the control of that same railway by the elaborate governmental process above mentioned, is significant. But this elaborate governmental process long ago appeared insufficient and inadequate to deal with such business as affects the public service. Our parliamentary bodies, being incapable of dealing in detail with the questions involved, have established numerous administrative commissions, both state and national. There are no more interesting questions in our law today than those affecting the status of these different administrative bodies. Whether their functions are legislative, executive, or judicial; whether they combine all of these functions; how far such functions can be imposed upon them; and how far their action has any element of finality, are

questions which have taxed, and sometimes over-taxed the learning and wisdom of our ablest courts. It must be apparent to any observer that the object of these commissions, generally speaking, is administrative, that is, to protect the interest of the public in the management of the business over which the commission is given control, and to exercise that protection by such methods as are appropriate and reasonable. It is almost impossible, however, for the jurist to untangle the composed decisions which have arisen from the failure to recognize that the terms "legislative," "executive," and "judicial" fail to describe the whole sphere of governmental activity. We may tell an intelligent student that the act of the government through one of its agencies in ordering two trains a day to run to Cranberry Centre instead of one is a legislative act, and that the act of the postmaster-general in ordering two mails a day instead of one to be delivered at Cranberry Centre, is an executive act, but we ought not to be too much surprised if he fails to understand what we are talking about. It would be an interesting study to trace the development of the term "administrative" in our American reports. In a recent decision in Connecticut relating to the constitutionality of an act authorizing an appeal from the railroad commissioners to the superior court on the question of a plan for the elimination of a grade crossing, the court held

> that the board of railroad commissioners is an administrative body, that the subject-matter of its action in the proceedings appealed from was purely administrative, and that the proceedings before it and its order therein were also administrative and in no sense judicial,

and therefore held that the act authorizing the appeal was unconstitutional. The constitution on which this decision was based does not use the term "administrative." It is interesting, therefore, to note that while the constitution prohibits the exercise of executive or legislative power by the judicial department, the court holds that the judicial department cannot exercise administrative powers, of which no mention whatever is made in the constitution. This construction of the Connecticut constitution was established in 1897 by the opinion of three judges against two, Judge Baldwin, now chief justice, writing a very able dissenting opinion. Virginia, on the other hand, has created a corporation commission with legislative, executive and judicial powers, and has made the Supreme Court of the state an administrative court in the proper sense, as distinguished from a judicial tribunal, for the review of the actions of the corpora-

tion commission. Connecticut and Virginia, therefore, represent apparently the two extremes of constitutional attitude toward these administrative commissions. Just where the interstate commerce commission stands under the Hepburn act, is not quite clear. In a recent article Mr. H. D. Newcomb says:

What may be called the administrative theory of the new law asserts that for the mechanism for enforcement thus defined, (by the previous act), the Hepburn law attempts to substitute a sort of advance legislative acceptance of an indefinite series of blank drafts, containing only the maker's name, to be filled out at discretion by the interstate commerce commission, which is thus empowered to draw at will upon the reservoir of federal power over railway rates and methods.

Mr. Newcomb takes the position that the commission cannot have legislative power because legislative power cannot be delegated. On this point, however, we have opposed to his view not simply the opinions of the members of the commission themselves, but also more than one recent decision of the supreme court of the United States. In the case of the interstate commerce commission vs, The Cincinnati, New Orleans & Pacific R. R., 176 U. S. 479, 494, the court said:

Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions as well as to that rule which is as old as the existence of common carriers, to wit: that the rates must be reasonable.

In the recent case of the Home Telephone Co., vs. Los Angeles, 211 U. S. 265, 278, the court says, that

Rate regulation is purely a legislative function, even when exercised by a subordinate body upon which it is conferred.

In the case of the Honolulu Rebate & Transit Co. vs. Hawaii, 211 U. S. 282, the court says:

The power of regulation (of carriers) is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation.

In that case the court held that the primary duty of a traction company

is to operate a sufficient number of cars to meet the public convenience. If the company itself complies with this duty by just and reasonable regulations of its own, it is enough.

Under the legislation of Hawaii it was held that upon the failure of the company to comply with this duty, an administrative official might issue regulations binding on the company with reference to the operation of its cars.

Judge Cooley in his work on *Constitutional Limitations*, (7th edition, page 163), says that

> one of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.

It seems unfortunate that by applying the term "legislative function" to the action of an administrative body in regulating corporations, this constituional maxim should be rendered unintelligible. In the case of the interstate commerce commission vs. Cincinnati, etc. Railway Co., 167 U. S. 479, 495, the court said that

> administrative control over railroads through boards of commissions was no new thing.

The term "administrative control" there used by the court, has been used in the title of this paper, and seems to express the actual relation of the state to corporations far better than the term "legislative "or "executive." As a matter of logic-chopping, if the powers of the state are all either legislative, executive or judicial, the term "administrative" has no meaning unless it refers to a combination of these powers, which theoretically is a constitutional impossibility.

The development of American industry and commerce has hitherto taken place under laws which have left to the corporations the determination in the first instance, as the court says in the Honolulu case, of what are the just and reasonable regulations to enable those corporations to comply with their duty to the public. As the result of this method of procedure, great triumphs have been achieved in the organization and conduct of business. Popular dissatisfaction with the distribution of the rewards of these economic victories,and to a far greater extent with the political power exercised by the corporations, has led to a demand for much stricter control and regulation by the states and by the United States. Active and efficient control by a parliamentary body through statutes being impossible, there has been a recent demand by a very popular executive for increased executive power, together with some show of indignation at judicial decisions which hold that the powers of administrative officers and tribunals are not as broad as those officers have desired.

Some persons who have enthusiastically supported this demand for the extension of executive power, have failed to realize that the personal popularity of a particular executive offers us no guide as to the permanent power which should be entrusted exclusively to the executive department of the government. Nothing, in fact, is more foreign to a democratic government than the entrusting of arbitrary power to its executive head; and nothing can cause deeper distrust in the law of the land than the idea that that law is to be enforced only against such persons as may be unfortunate enough to encounter the personal hostility of the executive. If greater and more efficient control of corporations is desired, the proper remedy, in a democratic country is not to confer increased power upon the executive, as such, free from all judicial control, however natural may be the executive belief in that remedy. The true remedy is to provide further administrative control, vesting such control in a body of administrative officers who shall combine executive firmness and activity with legislative wisdom and judicial discretion and fairmindedness. It is impossible for a political executive to fill all of these administrative requirements in his own person. It is not, however, impossible that administrative officers should be appointed by the executive who may bring about the desired results. Just as judges in a civilized community are appointed to administer justice between man and man without regard to the political or personal relations of the parties, so administrative officers may be appointed to administer justice between the public and the corporations without regard to the political necessities or beliefs of the appointing power. If it is not yet universally appreciated by the people that administrative officers ought to act just as jairly as judges of the courts, it is because the distinction between the administrative and the political functions of the government has been so sadly neglected in the legal and political education, not simply of the people at large, but of the American bar.

This neglect, however, is being remedied; and that Columbia University should be selected as the place for the discussion of administrative law, is a fitting recognition of the admirable work done by Professor Goodnow in encouraging and facilitating the study of a subject which is of so much practical importance.

Distinct signs of a popular awakening to the necessities of a competent and unpolitical administration of the government are now visible. Civil service reform has already freed vast numbers of minor administrative officials from political control, and there is today a

strong and growing demand for the appointment to administrative commissions of men of the same character and ability as those who are appointed to the bench. The dangers of a political judiciary are generally recognized. It is not too much to hope that the recognition of the dangers of political administrative commissions will become equally general. In such commissions lies the whole future of the administrative control of corporations in this country. The legislature may and will enact laws establishing general principles of conduct governing the relations of the corporations to the public. The courts will when necessary lend their judicial power to aid such administrative commissions on the one hand, or to protect the corporations or the public against their abuse of power, on the other. I have said, "to protect the corporations or the public," for it must not be overlooked that an order of a commission may affect injuriously, not simply the corporation against which that order is directed, but also the public at large. By a change in the basis of railroad rates, a commission may not simply cause loss to the railway companies affected, but may also compel the removal of a particular business affected, from New York to Chicago, or from Boston to Baltimore. In fact, it is an open question whether existing industries are not more liable to injury by changes in railroad rates ordered by commissions than are the railroads themselves; and certainly the task of determining what rate will fairly remunerate the railroad is far easier than that of determining what differential should be allowed as between two Atlantic seaports.

One of the great questions in the administrative control of corporations is the question of the control of the administrative body itself. Great complaint has been made of the interference of the courts with the administration. It seems that there should be some review of administrative action, but the review of that action by litigation in the courts is so tedious a process that impatience is naturally inspired in the public mind. There is, therefore, a demand either that the administrative body shall be independent of all control, or that the review of its acts shall be only by some superior administrative authority. As regards the administrative review of administrative acts, the objections to such review by a hierarchical appeal to an immediate official superior have been pointed out by Mr. Parker. Various controversies in administrative circles might be cited to show that personal and political considerations almost inevitably affect the action of an official superior in reviewing the

action of a subordinate. Mr. Parker, therefore, has justly emphasized the necessity that the reviewing tribunal should be an administrative court free from the direct control of the political administration. Such an administrative court has been created in Virginia, where administrative appeals may be taken from the corporation commission to the supreme court sitting in an administrative capacity. The existence of a right of administrative appeal, however, does not deprive the judicial tribunals of their jurisdiction, which may be invoked against illegal action on the part of administrative officials.

Attempts have been made by providing for notice and a hearing before administrative bodies to render their orders binding as judicial decrees, but such attempts have proved unsuccessful. In the recent case of Prentis vs. Atlantic Coast Line, 211 U. S., 210, the court holds that the making of a rate by a legislative or administrative body after hearing the interested parties, is not *res judicata* upon the validity of that rate when questioned by those parties in a suit in court. Litigation does not arise until after legislation, nor can a state make such legislation *res judicata* in subsequent litigation. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under existing laws, while legislation looks to the future and changes conditions making new rules to be thereafter applied.

In certain respects the present tendency of judicial decisions is to strengthen the hands of the administration. In the recent case of Oceanic Steam Nav. Co. vs. Stranahan, 214 U. S. 320, the court holds that it is within the competency of Congress when legislating as to matters exclusively within its control, to impose appropriate obligations, sanction their enforcement by reasonable money penalties, giving the executive officers the power to enforce such penalties without the necessity of invoking the judicial power. The administration, therefore, can be made practically independent of the necessity of resorting to the court to compel obedience to its lawful action, if proper legislation confers upon the administration power to enforce its own orders by administrative methods, as distinguished from methods requiring the exercise of judicial authority, as in the case of Wing Wong vs. U. S., 163 U. S. 228. Again, even where the administration has to resort to the courts to collect a penalty for the violation of its orders, such penalty may be collected in a civil suit, where it is much easier for the government to succeed. Again, if the administrative officer is willing to take the risk of a subsequent trial by

jury on the question of the legality of his act, his right to proceed summarily, in cases of emergency under the police power, is upheld by the recent case of North American Cold Storage Co. vs. Chicago 211 U. S. 306.

Perhaps the most common and most important occasion of conflict between the administration and the courts, and often between the legislature and the courts, arises on the question of the legality of the rates fixed for public service by the administrative or legislative body. It is unconstitutional for the government, either state or national, to compel a public service corporation to devote its property to the public service at a rate so low as to deprive the corporation of reasonable compensation. Whenever, therefore, any attempt is made by legislation or by administrative order to lower rates, the corporation has the right to claim that such law or order is unconstitutional, and to appeal to the courts for protection against the enforcement of such law or order by the administrative authorities. The effect of this, where the court sees fit to grant a temporary injunction, is to postpone the operation of the law or order until a judicial determination that such law or order is constitutional. Such litigation has been fruitful of public criticism upon the courts for interfering with legislative or administrative authority, and especially upon the federal courts for interfering with the state authorities. Most of such criticism is groundless. A suit to enjoin the state officials from enforcing an unlawful act of the legislature or order of a commission, is not a suit against the state, but against officials who are assuming to act without authority of law in the name of the state.[1]

Two recent decisions of the United States supreme court will do much in the future to diminish such criticism. The first case, Prentis *v.* Atlantic Coast Line,[2] holds that where there is an administrative appeal allowed, as in Virginia, from the action of the administrative body making the order claimed to be illegal, to a higher administrative tribunal, the plaintiff, if he comes into equity to enjoin the enforcement of the illegal order, ought to show that he has first exhausted his rights in the administrative tribunals of the state itself. The second case, that of Wilcox *v.* Consolidated Gas Co., 212 U. S. 19, holds that the case must be a clear one before the courts should be asked to interfere by an injunction with the state legislation

[1] Spencer's Appeal, 78 Conn. 301, 306.

[2] Prentis *v.* Atlantic Coast Line, 211 U. S. 210.

regulating rates, in advance of any actual experience of the practical result of such rates. These two decisions will tend to relieve the pressure upon the federal courts for interference with the action of state authorities in the matter of rates.

Whether any legislation will or can ever be adopted relieving the administration entirely from the interference by courts in regard to administrative orders affecting corporations, is doubtful. The right to a judicial determination of the reasonableness of the rates prescribed by the administration cannot under our present constitution be taken away from the corporation. It might perhaps be possible, however, by providing an indemnity fund of sufficient size, and authorizing the court to award to the corporation from such indemnity fund adequate compensation for the injury caused to its legal rights by a reduction in rates, to make such reduction effective immediately, leaving the corporation to obtain its compensation by appropriate litigation. The United States government has a right to have second-class mail matter carried at less than the actual cost of transportation, but it has no right to throw the loss caused by such carriage upon the railroad companies. The railroad companies must be paid the cost of their service, and if the publishers get that service from the government at less than cost, the tax-payers must provide the amount of the difference. The United States government charges less than the cost of carriage for second class mail matter because of the belief of Congress that it is a good thing for the people who pay taxes to encourage distribution of newspapers and periodicals for the public enlightenment. If it occurs to Congress that it is equally desirable that corn, or cotton, or coal should be carried at rates less than the cost of the service rendered, the government in some form may provide for such carriage; but under the constitution the burden of the loss must be thrown upon the tax-payers, and not upon the persons whose capital is invested in the railway companies. Any law, therefore, requiring a public service corporation to furnish any service at less than a reasonable rate, or requiring such corporation to conduct its business in a particular manner without protection from loss, and for securing due compensation, is unconstitutional, and the defect cannot be healed by a judicial degree which attempts to insert adequate provisions for the protection of the corporation from such laws. The law itself must save the party's rights and not leave them to the discretion of the courts as such.[3]

[3] Louisville & Nashville R. R. Co. *vs.* Central Stock Yards Co., 212 U. S. 132.

It is, therefore, necessary that any legislation which is to free the administrative control of corporations from judicial interference shall itself provide for adequate compensation to the corporations for injury resulting from such unrestricted control. Hitherto, the statesmen who have argued against the judicial restriction of such control have not been willing to assume the responsibility of asking their constituents to pay the necessary price for the removal of such restriction. That the demand for the confiscation of private property by legislative act or executive decree has been steadily and successfully resisted by the courts, shows the immense service to the public welfare of an independent judiciary. That criticism should be directed at the judiciary for its protection of the fundamental rights guaranteed by our federal constitution is unfortunate. The corporation may be made to play any tune which the people may wish to dance, but those who dance must pay the piper. Ultimately the good sense of the American people will recognize this fact, and the present transition stage of conflict between corporations, courts, legislatures and administrations, will be succeeded by an era in which common sense and fair dealing, with improved non-political administrative machinery, will render the administrative control of corporations as normal a function of government as any other.